

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATHANIEL MARCUS GANN,

Plaintiff,

vs.

VALLEY STATE PRISON, et al.,

Defendants.

1:19-cv-01797-DAD-GSA-PC

**ORDER GRANTING DEFENDANTS'
MOTION TO MODIFY SCHEDULING
ORDER
(ECF No. 39.)**

**ORDER EXTENDING EXHAUSTION MOTION
FILING DEADLINE FROM NOVEMBER 24,
2021 TO JANUARY 24, 2022**

Plaintiff Nathaniel Marcus Gann is a state prisoner proceeding *pro se* and *in forma pauperis* with this civil rights action pursuant to 42 U.S.C. § 1983. This case now proceeds with Plaintiff's First Amended Complaint filed on February 7, 2020, against Defendants Warden Raythel Fisher, Jr., Dining Hall Officer Paez, and Culinary Staff Members Anguiano, Chapas, Lucero, Marquez, Cruz, and Moosebaur for violation of RLUIPA, violation of the First Amendment Free Exercise Clause, and adverse conditions of confinement in violation of the Eighth Amendment; against Defendants Warden Raythel Fisher, Jr., and Moosebaur for failure to protect Plaintiff in violation of the Eighth Amendment; and, against Defendant Moosebaur for retaliation in violation of the First Amendment. (ECF No. 20.)¹

¹ On June 7, 2021, the court issued an order dismissing all other claims and defendants from this case, for Plaintiff's failure to state a claim. (ECF No. 30.)

On August 24, 2021, the court issued a Discovery and Scheduling Order establishing pretrial deadlines for the parties, including an exhaustion motion filing deadline of November 24, 2021. (ECF No. 36.) On November 12, 2021, Defendants filed a motion to modify the Scheduling Order. (ECF No. 39.)

II. MOTION TO MODIFY SCHEDULING ORDER

Modification of a scheduling order requires a showing of good cause, Fed. R. Civ. P. 16(b), and good cause requires a showing of due diligence, Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). To establish good cause, the party seeking the modification of a scheduling order must generally show that even with the exercise of due diligence, they cannot meet the requirement of the order. Id. The court may also consider the prejudice to the party opposing the modification. Id. If the party seeking to amend the scheduling order fails to show due diligence the inquiry should end and the court should not grant the motion to modify. Zivkovic v. Southern California Edison, Co., 302 F.3d 1080, 1087 (9th Cir. 2002).

Here, Defendants request an extension of the exhaustion motion filing deadline from November 24, 2021 to January 24, 2022, because of circumstances unforeseen by defense counsel when the court issued its August 24, 2021 order. Due to the circumstances, Defendants require additional time to review Plaintiff's discovery responses, take Plaintiff's deposition, prepare any discovery motions that may be necessary, and then prepare the summary judgment motion documents and supporting declarations. Defense counsel is "currently assigned to seventeen other matters, which all have upcoming deadlines." (Decl. of T. Lessner, ECF No. 39-2 at 2-6 ¶ 3.) Furthermore, counsel "had to continue Plaintiff's deposition at the last minute" until "approximately one month after the deadline to file an exhaustion motion expires," because the prison "could not accommodate the virtual deposition set for November 15, 2021." (Id. at 6 ¶¶ 6, 7.)

Based on the above the court finds good cause to grant Defendants' motion and extend the exhaustion motion filing deadline in the court's Discovery and Scheduling order. Defendants have shown that even with the exercise of due diligence, they cannot meet the requirements of the order. Therefore, Defendants' motion to modify the exhaustion motion filing deadline in the

Discovery and Scheduling Order from November 24, 2021 to January 24, 2022, shall be granted.

III. CONCLUSION

Based on the foregoing, IT IS HEREBY ORDERED that:

1. Defendants' motion to modify the court's Discovery and Scheduling Order, filed on November 12, 2021, is GRANTED;
2. The deadline for filing exhaustion motions is extended from November 24, 2021 to **January 24, 2022**;
3. All other provisions of the court's August 24, 2021 Discovery and Scheduling Order remain the same.

IT IS SO ORDERED.

Dated: **November 16, 2021**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE